THURSFIELDS
Solicitors

Holiday Pay – Group Discussions

Speaker: Lisa Kemp

- Recognised in the Legal 500 as a leading employment solicitor.
- Considerable experience advising clients, across a spectrum of sectors, from owner managed businesses to well known global brands.
- Provides focused, pragmatic advice to employers on their day-to-day HR issues as well as providing strategic support on business reorganisation/redundancies and tribunal litigation work.

Objectives

- High level overview of the law.
- Group discussion/debate.
- Feedback.

Holiday Entitlement

- Under the WTR 1998 all workers qualify for 5.6 weeks (a maximum of 28 days).
- All workers are entitled to take holiday and to be paid in respect of unused holiday on termination.
- Working Time Directive 2003.

Part-time Workers and Atypical Workers

- The WTR 1998 do not set out how to convert a weekly entitlement into days or hours although doing so will be preferable for many employers.

- Problematic where it is not known in advance for how long a temp or casual worker will be engaged or how many hours per week they will work.

- Permitting a worker to accrue holiday at a specified notional rate each month is a common approach. An accrual rate of 12.07% of hours worked is common (**representing holiday expressed as a percentage of working time**).

Discussion point: What other methods are commonly used?

Casual Workers Continued

- The formula is not prescribed in statute and is nothing more than a rule of thumb.
- Case law has shown that this method can be unreliable, and does not always produce a result that is compliant with the legislation.
- The 12.07% method becomes most problematical where there are weeks during which the worker remains under contract but does no work. The longer the period without work, the more inaccurate it becomes.

Harpur Trust v Brazel

Facts

- A music teacher at a school who was only paid for the hours she worked.
- Mrs B's hours varied and she had long periods without work.
- At the end of each school term she would take her accrued holiday and the school would pay her holiday pay based on an entitlement of 12.07% of the **hours worked** over the term.
- Mrs B claimed she had been underpaid according to the WTR 1998.
- The school argued that as Mrs B only worked for part of the year her holiday entitlement should not be 5.6 weeks per year but should be reduced proportionate to the number of weeks she actually worked.
- The Employment Tribunal agreed with the school's approach. However, Mrs B appealed.

Harpur Trust v Brazel

Decision

- The Court of Appeal ruled that pro-rating was not appropriate.
- The Court held that despite not working the full year, Mrs B was still entitled to 5.6 weeks holiday. Therefore, her holiday pay should not be limited to 12.07% of her salary but had to be calculated at the time holiday is taken based on average earnings over the last 12 remunerated weeks (now 52 weeks) as required by the relevant provisions.
- This calculation results in a higher rate of pay for their holiday of 17.5%. The Court confirmed that it does not matter that a part year worker had a higher accrual rate.

Discussion: Do we have sympathy with the school?

Discussion: Is there still a place for the 12.07% method?

Calculating Holiday Pay

Holiday pay – what is included?

For the purposes of calculating holiday pay for WTD leave (i.e. **four weeks** of leave in each holiday year), they must be calculated in accordance with the tests laid down in case law, whereby holiday pay is based on pay that is **normally received**, which must include:

- Payments linked intrinsically to the performance of the tasks which the worker is required to carry out under their contract of employment.
- Payments which relate to the worker's professional and personal status.
- An amount to reflect the contractual results-based commission a worker ordinarily receives.

Discussion: What is and isn't included? What about pay for additional leave (i.e. the 1.6 weeks domestic leave) or any additional contractual leave?

Group Discussion Points

1. Other than the 12.07% method, what other approaches are taken to calculate a workers' holiday?

2. Thinking of the Harper Trust v Brazel case, is there still a place for the 12.07% method? Are we sympathetic towards Mrs Brazel or the school?

3. When calculating holiday pay, what payments are included? What approach is taken when calculating pay for additional leave (i.e. the 1.6 weeks domestic leave) or any additional contractual leave?

Thank you for listening
Keep in touch!

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